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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JAIME ACOSTA,

12 Petitioner,

13 vs.
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15 F. GONZALEZ, Warden *et al.*,

16 Respondents.
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Case No. 11cv1313-DMS (BGS)

**ORDER ADOPTING REPORT
AND RECOMMENDATION,
DISMISSING PETITION
WITHOUT PREJUDICE, AND
DENYING CERTIFICATE OF
APPEALABILITY**

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19 Petitioner Jaime Acosta, a state prisoner proceeding *pro se*, filed a petition for writ of habeas
20 corpus under 28 U.S.C. Section 2254, seeking relief from a \$5,000 restitution fine imposed in
21 connection with his murder conviction. The petition was referred to United States Magistrate Judge
22 Bernard G. Skomal for a report and recommendation pursuant to 28 U.S.C. Section 636(b)(1)(B) and
23 Civil Local Rule 72.1(d). Respondents filed a motion to dismiss for lack of jurisdiction and Petitioner
24 moved for leave to amend. On January 23, 2012, the Magistrate Judge issued a Report and
25 Recommendation, recommending to grant Respondents' motion to dismiss and deny Petitioner's
26 motion for leave to amend.

27 In reviewing a magistrate judge's report and recommendation, the district court "shall make
28 a *de novo* determination of those portions of the report . . . to which objection is made," and "may

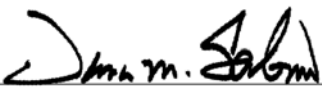
1 accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate
2 judge." 28 U.S.C. § 636(b)(1). Petitioner objects to the Report and Recommendation.

3 Because Petitioner challenges solely the restitution portion of his state court judgment, the
4 Court lacks jurisdiction to consider the petition under 28 U.S.C. Section 2254. *Bailey v. Hill*, 599 F.3d
5 976 (9th Cir. 2010). In his objections Petitioner argues the Court should construe his petition under
6 28 U.S.C. Section 2241 or grant leave to allege a claim under section 2241. However, when as here,
7 a petitioner is in custody pursuant to a state court judgment, he can only proceed under section 2254.
8 *White v. Lambert*, 370 F.3d 1002, 1004, 1006-10 (9th Cir. 2004), *rev'd on other grounds*, *Hayward*
9 *v. Marshall*, 603 F.3d 546, 554 (9th Cir. 2010).

10 Accordingly, Petitioner's objections are **OVERRULED** and the Report and Recommendation
11 is **ADOPTED**. Respondents' motion to dismiss is **GRANTED** and Petitioner's motion for leave to
12 amend is **DENIED**. The petition is **DISMISSED WITHOUT PREJUDICE**. Certificate of
13 appealability is **DENIED**.

14 **IT IS SO ORDERED.**

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16 DATED: February 22, 2012

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19 HON. DANA M. SABRAW
20 United States District Judge
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